AFFIN BANK BHD

v.

TAN SRI KISHU TIRATHRAI

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ABDULL HAMID EMBONG JCA
VINCENT NG JCA
[CIVIL APPEAL NO: W-03-172-06]
17 DECEMBER 2007

BANKRUPTCY: *Receiving and adjudication orders - Appeal against - Proof of debt - Whether creditor must prove debt again at hearing of petition - Whether affidavit verifying petition insufficient - Bankruptcy Act 1967, s. 6(2)*

STATUTORY INTERPRETATION: *Construction of statutes - Mandatory or directory - Word "shall" in s. 6(2) Bankruptcy Act 1967 - Whether mandatory for creditor to prove debt again at hearing of petition*

WORDS & PHRASES: *"shall" - Bankruptcy Act 1967, s. 6(2) - Whether mandatory or directory*

BANKRUPTCY: *Jurisdiction - Judgment - Whether judge precluded from going behind judgment which had not been set aside or stayed*

BANKRUPTCY: *Notice - Validity - Whether there was failure to give notice to dispute amount in bankruptcy notice within time prescribed - Bankruptcy Act 1967, s. 3(2)(ii)*

The appellant/judgment creditor, who had granted the respondent/judgment debtor an overdraft facility amounting to RM2,500,000, commenced an action against the respondent due to default by the respondent in making payments under the facility. The appellant, on 19 February 2002, obtained summary judgment before the senior assistant registrar and the respondent's subsequent appeal against the decision to the judge in chambers was dismissed. The appellant then commenced bankruptcy proceedings against the respondent, serving a bankruptcy notice and creditor's petition on him. The respondent sought to set aside the creditor's petition but the senior assistant registrar dismissed his application. Since the respondent's appeal to the judge in chambers was also dismissed, he filed an appeal to the Court of Appeal against the decision, which appeal was still pending.

A On 11 May 2005, the senior assistant registrar made a Receiving Order and Adjudication Order against the respondent. The respondent's subsequent appeal against that decision was allowed by the learned High Court judge on 16 October 2006, resulting in the present appeal by the appellant. The issue requiring
B determination was whether the appellant had complied with s. 6(2) of the Bankruptcy Act 1967 ('Act'). The respondent contended that s. 6(2) of the Act is very clear that the petitioning creditor must prove his debt at the hearing of the creditor's petition, and that the affidavit verifying the petition which exhibited the
C judgment dated 19 February 2002 was insufficient and could not be relied on to prove the debt. The appellant, however, submitted that the summary judgment dated 19 February 2002 was *prima facie* evidence of the debt owed by the respondent and that the summary judgment, upon appeal, was affirmed by the judge. The
D learned judge accepted the respondent's contention and in arriving at his decision, he applied the *ratio* in *Re Purrett, ex p Purrett*.

Held (allowing the appeal)
Per Vincent Ng JCA delivering the judgment of the court:

E **(1)** The learned judge in the appeal fell into error when he followed *Re Purrett* without proper analysis of the peculiar factual matrix that governed that decision. He should not only have taken heed of the binding authority in *Sovereign General Insurance v. Koh Tian Bee* but should have also followed the
F rational and practical decision in *Teok Kien Seng, Re: ex p Saw Siew Chew*. The respondent in the instant case had neither provided any material or iota of evidence before the High Court that the value of the debt had fallen below the
G statutory threshold sum of RM30,000 nor did he set out some other cogent reason to challenge the petition, such as happened in *Re Purrett (supra)*. Since the affidavit verifying the petition was not challenged, the "personal attendance" of the petitioning creditor was not required and the attendance of
H the bank's counsel was sufficient. *Sovereign General Insurance v. Koh Tian Bee* (foll); *Teok Kien Seng, Re: ex p Saw Siew Chew* (foll); *Re Purrett, ex p Purrett* (dist). (paras 12, 14 & 15)

(2) One of the accepted and settled canons of construction is that the expression "shall" in a statutory provision should not
I always be construed to be mandatory in nature without any regard to the circumstances in which the provision is meant

to be applied. Thus, notwithstanding the word "shall" that appears in s. 6(2) of the Act, it is not a mandatory requirement for the petitioning creditor to prove the debt again through cross-examination at the hearing of the petition, especially when the affidavit verifying the petition was never challenged and there was no material before the court to challenge the affidavit. The word "shall" in s. 6(2) of the Act should be liberally interpreted in the context of bankruptcy proceedings. The word should be construed as directory rather than mandatory in nature. (paras 16 & 17)

(3) The court below should have abided by the decision in *Sovereign General Insurance (supra)* which precludes the judge from going behind a judgment which has not been set aside or stayed. The fact that the appeal on the summary judgment was dismissed went to show that there was a clear proof of debt. Also, s. 3(2)(ii) of the Act would further weaken the respondent's case as it provides that "a bankruptcy notice … shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on ground of such mistake." Here, the respondent had failed to give any notice to dispute the amount in the bankruptcy notice within the time prescribed. Consequently, the respondent was estopped from contending that the amount claimed was erroneous. *Sovereign General Insurance v. Koh Tian Bee* (foll). (paras 18, 19 & 20)

[Judge's order dated 16 October 2006 set aside; senior assistant registrar's order granted on 11 November 2005 reinstated.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu/pemiutang penghakiman, yang memberi kemudahan overderaf berjumlah RM2,500,000 kepada responden/penghutang penghakiman, telah memulakan tindakan terhadap responden ekoran kemungkiran responden membayar balik kemudahan tersebut. Pada 19 Februari 2002, perayu memperoleh penghakiman terus dari penolong kanan pendaftar dan rayuan responden terhadapnya telah ditolak oleh hakim. Perayu kemudian memulakan prosiding kebankrapan terhadap responden, sambil menyerahkan notis kebankrapan serta petisyen pemiutang kepada responden.

A Responden memohon untuk mengenepikan petisyen pemiutang tetapi permohonan itu ditolak oleh penolong kanan pendaftar. Disebabkan rayuannya kepada hakim dalam kamar juga ditolak, maka responden memfailkan rayuan ke Mahkamah Rayuan, rayuan mana masih lagi menunggu keputusan.

B

Pada 11 Mei 2005, penolong kanan pendaftar membuat Perintah Penerimaan dan Penghukuman terhadap responden. Rayuan responden terhadap keputusan ini telah dibenarkan oleh yang arif hakim Mahkamah Tinggi pada 16 Oktober 2006, sekaligus
C membangkitkan rayuan semasa oleh perayu di sini. Isu yang memerlukan pemutusan adalah sama ada perayu telah mematuhi s. 6(2) Akta Kebankrapan 1967 ('Akta'). Responden berhujah bahawa s. 6(2) Akta adalah amat jelas, iaitu bahawa pemiutang yang mempetisyen harus membuktikan keberhutangannya di
D pendengaran petisyen pemiutang, dan bahawa afidavit mengesahkan petisyen yang mempamerkan penghakiman bertarikh 19 Februari 2002 adalah tidak memadai dan tidak boleh dijadikan asas untuk membuktikan hutang. Perayu sebaliknya berhujah bahawa penghakiman terus bertarikh 19 Februari 2002 adalah
E keterangan *prima facie* hutang yang ditanggung oleh responden dan bahawa penghakiman terus juga, di atas rayuan, telah disahkan oleh hakim. Yang arif hakim telah menerima hujah responden dan dalam mencapai keputusannya telah menggunapakai *ratio* di dalam *Re Purrett, ex p Purrett*.

F

Diputuskan (membenarkan rayuan)
Oleh Vincent Ng HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim di rayuan khilaf bilamana beliau mengikuti *Re*
G *Purrett* tanpa menganalisa secukupnya halkeadaan fakta yang khusus terdapat dalam kes itu. Beliau bukan sahaja perlu mengambil perhatian terhadap autoriti mengikat *Sovereign General Insurance v. Koh Tian Bee*, malah harus juga menuruti keputusan yang rasional dan praktikal di dalam *Teok Kien Seng,*
H *Re: ex p Saw Siew Chew*. Responden dalam kes semasa tidak mengemukakan apa-apa material atau secebis pun keterangan di hadapan Mahkamah Tinggi bahawa nilai hutang telah jatuh ke paras di bawah paras jumlah statutori RM30,000, dan beliau juga tidak memberi sebab-sebab lain yang munasabah
I bagi mencabar petisyen sepertimana yang berlaku di dalam *Re*

Purrett (supra). Memandangkan afidavit mengesahkan petisyen tidak dicabar, "kehadiran peribadi" pemiutang yang mempetisyen tidaklah diperlukan dan kehadiran peguam bank adalah memadai. *Sovereign General Insurance v. Koh Tian Bee* (diikuti); *Teok Kien Seng, Re: ex p Saw Siew Chew* (diikuti); *Re Purrett, ex p Purrett* (dibezakan).

(2) Salah satu kaedah tafsiran yang sudah mantap dan sudah lama diterimapakai adalah bahawa ungkapan "shall" di dalam peruntukan statut tidak sentiasanya boleh ditafsir sebagai bersifat mandatori tanpa melihat kepada halkeadaan di mana peruntukan tersebut dihasrat untuk dilaksanakan. Oleh yang demikian, walaupun perkataan "shall" wujud pada s. 6(2) Akta, ia bukanlah suatu kehendak mandatori bahawa pemiutang yang mempetisyen harus sekali lagi membuktikan hutang melalui soalan-soalan balas di pendengaran petisyen, sementelah dalam keadaan di mana afidavit mengesahkan petisyen tidak pernah dicabar dan tidak juga terdapat material di hadapan mahkamah untuk mencabar afidavit tersebut. Perkataan "shall" di dalam s. 6(2) Akta harus ditafsirkan secara liberal di dalam konteks prosiding kebankrapan. Perkataan itu harus ditafsirkan sebagai mengarah dan bukannya bersifat mandatori.

(3) Mahkamah di bawah seharusnya mematuhi keputusan di dalam *Sovereign General Insurance (supra)* yang melarang hakim dari mentelaah penghakiman yang masih belum diketepikan atau digantungkan. Fakta bahawa rayuan terhadap penghakiman terus telah ditolak menunjukkan bahawa bahawa terdapat bukti kukuh mengenai hutang. Juga, s. 3(2)(ii) Akta telah melemahkan lagi kes responden memandangkan ia memperuntukkan bahawa "suatu notis kebankrapan … tidak menjadi tak sah hanya kerana jumlah yang tercatit di dalam notis sebagai jumlah yang terhutang melebihi jumlah yang sebenarnya terhutang kecuali penghutang dalam tempoh yang dibenarkan untuk membuat pembayaran memberi notis kepada pemiutang bahawa beliau mempertikai kesahan notis kebankrapan atas alasan kesilapan itu" Di sini, responden gagal memberi sebarang notis untuk mempertikai jumlah pada notis kebankrapan dalam tempoh yang ditetapkan. Oleh yang demikian, responden adalah diestop dari berhujah bahawa jumlah yang dituntut adalah silap. *Sovereign General Insurance v. Koh Tian Bee* (diikuti).

[Perintah hakim bertarikh 16 Oktober 2006 diketepikan; perintah penolong kanan pendaftar yang diberikan pada 11 November 2005 dikekalkan.]

Case(s) referred to:

Re Purrett, ex parte Purrett, Vol LXXIII The Law Times p 224 ***(dist)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(foll)***

Teok Kien Seng, Re: ex p Saw Siew Chew [1991] 3 CLJ 2599; [1991] 4 CLJ 136 HC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(2)(ii), 6(2)

For the appellant - Yoong Sin Min; (How Wei Theng with her); M/s Shook Lin & Bok

For the respondent - T Gunaseelan (Norman Fernandez with him); M/s Gunaseelan & Assoc

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D3-29-53-2003]

Reported by Suresh Nathan

JUDGMENT

Vincent Ng JCA:

[1] The facts of this appeal are as follows. The appellant (judgment creditor) granted to the respondent (judgment debtor) an overdraft facility to the tune of RM2,500,000. The respondent defaulted in making the payments under the facility.

[2] The appellant then commenced an action against the respondent *vide* Kuala Lumpur High Court Suit No. D4-22-524-2001 and had on 19 February 2002 obtained summary judgment before the Senior Assistant Registrar in the sum of RM2,538,959.50 (as at 31 December 2000). The respondent's appeal to the judge in chambers against the decision was dismissed on 27 February 2003.

[3] The appellant subsequently commenced bankruptcy proceedings against the respondent and issued a bankruptcy notice on 7 January 2003. The bankruptcy notice was served on the respondent on 30 April 2003.

[4] On 31 July 2003, the creditor's petition was filed against the respondent. Service of the creditor's petition on the respondent was by way of substituted service which was effected as follows:

(i) a copy of the creditor's petition was posted at the last known address of the respondent;

(ii) a copy of the creditor's petition was posted at the notice board of the court;

(iii) the creditor's petition was advertised in the New Straits Times.

[5] By a Notice of Intention to Oppose the creditor's petition dated 10 June 2004 (encl. 17) and summons in chambers dated 11 June 2004 (encl. 19), the respondent sought to set aside the creditor's petition.

[6] On 5 November 2004 the Senior Assistant Registrar dismissed the notice to oppose and the summons in chambers. The respondent's appeal to the judge in chambers was also dismissed on 9 May 2005. The respondent then filed an appeal to the Court of Appeal on 10 May 2005 against this decision. This appeal is still pending.

[7] On 11 May 2005, the Senior Assistant Registrar made a Receiving Order and Adjudication Order against the respondent. The respondent's appeal was allowed with costs by the learned judge on 16 October 2006. Thus, the appeal before us.

[8] The issue before us is whether the appellant had complied with the provision of s. 6(2) of the Bankruptcy Act 1967 ('the Act"). Section 6(2) of the Act states as follows:

(2) At the hearing the court shall require proof of:

(a) the debt of the petitioning creditor; and

(b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some or one of the alleged acts of bankruptcy; and

(c) if the debtor does not appear, the service of the petition, and if, satisfied with the proof may make a receiving order in pursuance of the petition.

[9] The respondent contends that s. 6(2) of the Act is very clear that the petitioning creditor must prove his debt at the hearing of the creditor's petition and that the affidavit verifying the petition which exhibited the judgment dated 19 February 2002 is insufficient and cannot be relied on to prove the debt.

[10] The appellant on the other hand contends that the summary judgment dated 19 February 2002 is *prima facie* evidence of the debt owed by the respondent. Indeed, on appeal, this judgment was affirmed by the judge, and there was no stay on that decision. The law is settled that the trial judge should not go behind the judgment to ascertain the validity of the order. The appellant referred us to the case of *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 *('Sovereign General Insurance')*, in which the Supreme Court had held that: "... in the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Nor is it open to the learned judge to strike out the creditor's petition by disputing the validity of the orders made in earlier execution proceedings when the orders have not been set aside."

[11] The learned judge in the court below accepted the respondent's contention and, in reference to s. 6(2) of the Act he said: "The provision is clear. At the hearing, the court shall require proof of the debt of the judgment creditor. In other words what counsel here is submitting is that beyond that as submitted by counsel for judgment creditor, it is mandatory for the court to nevertheless require proof of the debt of the petitioning creditor. That being manifestly absent, it has occasioned an injustice that resulted in the impugned orders of the Senior Assistant Registrar". And, his Lordship further added: "The fact that the judgment debtor may not have raised the issue at the hearing is of no consequence. The bankruptcy court is under a responsibility and is obliged to be satisfied by evidence, of the debt and this is so even if the judgment debtor does not appear at the hearing."

[12] After having read the cause papers and heard the submissions of both counsel we are of the view that, in arriving at the above conclusion the learned High Court Judge fell into error, when he applied the ratio in *Re Purrett, ex parte Purrett*, Vol LXXIII The Law Times p. 224 *('Re Purrett')* without proper analysis of the peculiar factual matrix which govern the decision. *Re Purrett* was a very old English case which, upon our careful reading, discloses the following features:

(i) according to Williams J, a debtor may appear to show cause against the petition and the act of bankruptcy on matters that the debtor shall have given notice that he intends to dispute, in which event the petition has to be proved. Williams J also

opined that the judgment creditor may if he requires, be given such further time as the court may think fit to enable him to prove the debt.

(ii) most importantly, well before the hearing of the creditors petition the debtor in *Re Purrett* did in fact give notice specifying the precise nature of his complaint.

(iii) the judgment debtor's primary complaint then before the bankruptcy court was that the bankruptcy proceedings were being used by the judgment creditor for the purpose of getting rid of the judgment debtor from the farm and not for purpose of collecting the debtor's assets, that is, the proceedings were used for a collateral purpose.

(iv) at the hearing of the creditors petition – even though the petitioning creditor was present at the bankruptcy proceedings – the registrar declined (wrongfully, according to Williams J) to order the petitioning creditor to go into the witness box to be cross examined. The registrar's reason for so declining was that since an office copy of the judgment was produced, the petitioning creditor need not be cross examined until some evidence to displace the judgment had been given.

(v) it must also be noted that even in *Re Purrett*, the other judge, Wright J had rightfully observed that the attendance of a judgment creditor is normally required for the purpose of scrutiny by the court during the bankruptcy proceedings.

[13] Having noted (i) to (v) above, our view is that the judges in *Re Purrett* were driven to allow the appeal against the registrar's decision because the latter should have, in justice, allowed cross examination of the petitioning creditor (who was indeed then present) on the issue of the judgment debtor's charge that the petition was tainted with a sinister collateral purpose of getting rid of the judgment debtor from his farm, even though the petition was based on a debt due upon a final judgment of the court. It is of interest to note that this old English case (more than 110 years old) was seldom if ever referred to by the English courts or our local courts. In any event, it is our view that to require personal attendance of the judgment creditor, where there are no assertions by the judgment debtor specifying precisely the matters which he intends to dispute or to challenge, would be

unreasonable and impracticable. It should also be observed that companies could only attend bankruptcy proceedings through their representatives but not 'in person'.

[14] With the greatest respect, the learned judge in the appeal now before us should not only have taken heed of the binding authority in *Sovereign General Insurance (supra)* but should also have followed the rational and practical decision of Shankar J in *Teok Kien Seng, Re: ex p Saw Siew Chew* [1991] 3 CLJ 2599; [1991] 4 CLJ (Rep) 136, who had this to say:

> Teok was not in Court. His Counsel submitted however that unless Saw was personally present the Court could not make the Orders. The presence of her solicitors was not enough. He cited Vol. 3 *Halsbury's Laws of England* 4th edn., para 341. The practice of our Courts has always been to allow judgment creditors to be legally represented. English authorities are at best persuasive and their citation on such mundane matters must be deprecated. However it will be observed that *Atkin's Encyclopedia of Court* Form Vol. 7 (Second Edn.,) at p. 98, para 35 specifically allows Counsel and solicitors to appear at the hearing of a bankruptcy petition.
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> The bankruptcy rules (hereafter referred to as the Rules) rr. 120 and 122 should not be read as requiring otherwise. *I agree with the official assignee that these Rules – which require the petitioning creditor to be present – must be taken to refer to a situation where he is acting in person or where there is serious challenge to the existence of the act of bankruptcy.*

[15] The respondent in the instant case had not provided any material or iota of evidence before the High Court that the value of the debt had fallen below the statutory threshold sum of RM30,000 nor did he set out some other cogent reason to challenge the petition such as has happened in *Re Purrett.* It is this court's view that, as the affidavit verifying the petition was not challenged, the 'personal attendance' of the petitioning creditor is not required and the attendance of the bank's counsel is sufficient.

[16] One of the accepted and settled canons of construction is that the expression 'shall' in a statutory provision should not always be construed to be mandatory in nature without any regard to the circumstances in which the provision is meant to be applied.

[17] Thus, notwithstanding the word "shall" that appears in s. 6(2) of the Act, it is the view of this court that it is not a mandatory requirement for the petitioning creditor to prove the debt again through cross examination at the hearing of the petition, especially when the affidavit verifying the petition was never challenged nor was there any material before the court to challenge the affidavit. Thus, we hold that the word "shall" in s. 6(2) of the Act should be liberally interpreted in the context of bankruptcy proceedings. The word should be construed as directory rather than mandatory in nature.

[18] It must be emphasized again that since there was no material before the court that requires the petitioning creditor to prove the debt again at the hearing, the court below should have abided by the decision in *Sovereign General Insurance (supra)*, which precludes the judge from going behind a judgment which has not been set aside or stayed.

[19] The fact that the appeal on the summary judgment was dismissed by the learned judge on 27 February 2003 goes to show that there is a clear proof of debt.

[20] Also, s. 3(2)(ii) of the Act would further weaken the respondent's case, as it provides that "a bankruptcy notice … shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake." Here, the respondent had failed to give any notice to dispute the amount in the bankruptcy notice within the time prescribed. Consequently, the respondent is estopped from contending that the amount claimed is erroneous.

[21] For the above reasons, we allowed the appellant's appeal with costs here and in the court below, and the deposit to be refunded to the appellant. The learned judge's order dated 16 October 2006 was set aside and the Senior Assistant Registrar's order granted on 11 May 2005 was reinstated.

[22] My learned brothers, YA Dato' James Foong Cheng Yuen, JCA and YA Dato' Abdull Hamid bin Embong, JCA have seen this judgment in draft and has expressed their agreement with it.